IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-752

T. L. BAKER,

Petitioner,

—v.—

LINNIE CARL MCCOLLAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES FOUNDATION OF TEXAS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Page

Statutes:

Law Review Articles:

Page

Treatises:

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES FOUNDATION OF TEXAS, AMICI CURIAE

INTEREST OF AMICI *

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 200,000 members. The American Civil Liberties Foundation of Texas is the ACLU's Texas state affiliate. Both organizations exist

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* Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

solely for the purpose of protecting the civil rights and liberties of Americans. Since 1920, one of the constant concerns of these organizations has been the need to provide adequate legal mechanisms to protect against, and remedy, violations of constitutionally protected rights. Amici are most concerned about the importance of protecting citizens' civil rights and liberties by imposing sanctions against those state officials who abuse their office or are indifferent to the rights of those they are supposed to serve.

Amici have frequently appeared before this Court in support of the historic role of 42 U.S.C. §1983 in remedying violations of federal civil rights, and in deterring departure from constitutional standards. We submit this brief amici curiae to urge the Court to preserve the role of §1983 in enforcing fidelity to the constitutional obligations of state officials entrusted with public power.

STATEMENT OF THE CASE

In October, 1972, a man carrying a driver's license in the name of "Linnie Carl McCollan" and identifying himself as "Linnie Carl McCollan" was arrested in Amarillo, Potter County, Texas, on a narcotics charge. In fact, the man arrested was Linnie Carl McCollan's older brother, Leonard McCollan, and he bore no physical resemblance to his brother. After Leonard McCollan's arrest, photographs and fingerprints were taken of him, and a set of the photos and fingerprints was routinely filed with the identification section of the Potter County Sheriff's Office.

Leonard McCollan was subsequently released on bail, but was later ordered re-arrested (A. 41). A warrant was issued for his re-arrest on November 3, 1972, but Leonard McCollan was identified in the arrest warrant as "Linnie Carl McCollan," the name on the driver's license.

The real Linnie Carl McCollan, respondent in this action, was stopped for a minor traffic violation in Dallas, Texas on December 26, 1972. A routine warrant check revealed that a "Linnie Carl McCollan" was wanted in Potter County, and respondent was therefore taken to the Dallas Police

Station. Dallas Police asked the Potter County Sheriff's Office to send an officer to collect the man they were holding. Although the photograph and fingerprints of the man sought under the warrant were readily available in the files of the Potter County Sheriff's Office, the Potter County Sheriff's deputy who went to Dallas to pick up the respondent took neither of them with him (A. 44). Since the respondent was not picked up by the Potter County deputy sheriff until four days after the Dallas police had called, the deputy sheriff had ample time to retrieve "Linnie Carl McCollan's" photograph and fingerprints from the Potter County files before he went to Dallas, but he failed to do so. Although Linnie Carl McCollan told both the Dallas Police and the Potter County sheriff's deputy that he was not and could not possibly be the "Linnie Carl McCollan" sought in the warrant because he had not been in Amarillo for two years (A. 99), he was nonetheless taken to the Potter County jail on December 30, 1972.

According to the subsequent testimony of petitioner Baker, the sheriff of Potter County at the time of Linnie Carl McCollan's incarceration, the ordinary policy of the Potter County Sheriff's Office was to have

the people responsible for the jail check with the office's identification section when an arrest was made pursuant to a warrant to ensure that the right person had been arrested (A. 45). In Linnie Carl McCollan's case, however, this routine check was not made for four days, over a long holiday weekend, despite his persistent protests. Although the sheriff personally communicated with and supervised his deputies over the telephone throughout that four day period, he did not come to his office until January 2, 1973. Upon his arrival, Baker checked the identification section file (which had inexplicably not been checked by his subordinates), realized instantly from the photographs contained there that the man in custody was not the man who had been sought, and ordered respondent's immediate release (A. 65).

Respondent sued the Dallas police officer who arrested him, the Dallas police chief, and Sheriff Baker and his surety under 42 U.S.C. §1983, charging that they had "wilfully, knowingly, and negligently" deprived him of numerous constitutional rights through "gross negligence and reckless disregard" (A. 8-9).

The Dallas defendants were dismissed from the suit before trial. At trial, petitioner Baker admitted that his deputies had failed to follow departmental policy on verifying the identities of persons arrested. He also conceded that, in sheriff's offices the size of his, when another department arrests someone pursuant to a locally issued warrant, "the ordinary thing" would have been to take the photographs and fingerprints of the person sought to the arresting police department to make sure that the right person had been arrested (A. 44). Nonetheless, after the close of the evidence by both parties, the trial court granted the defendants' motion for a directed verdict.

The Court of Appeals for the Fifth Circuit reversed and remanded for a new trial. Although it held that the deputies' actions were not attributable to the sheriff, a ruling which is not at issue or disputed here, the court held that "plaintiff was entitled to go to the jury on the basis of Sheriff Baker's own action or inaction." Specifically, the court said

> Sheriff Baker's failure to require his deputies to transmit the identification material described above

> "caused" plaintiff's continued detention. Plaintiff has made out a prima facie case under Bryan [Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976) (en banc), cert. denied 429 U.S. 865 (1976)], and Sheriff Baker can escape liability only if he acted in reasonable good faith....[because] [t]he sheriff himself testified that it was a standard practice in most sheriff's departments the size of his to send...identifying material. (A. 21-22).

In short, based on the evidence presented at trial, the court believed that a jury could have found a duty on the sheriff's part to exercise reasonable care to ensure that his subordinates promptly checked the identification of detainees against reasonably available records, that Sheriff Baker breached that duty, and that he caused respondent to be subjected to a deprivation of liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is our view that, for the three reasons set forth in Point I, the writ of certiorari should be dismissed as improvidently granted.

Should the Court decide to hear this case nonetheless, it is important to understand what this case does not involve. First, this case does not involve the §1983 liability of line officers for their negligent or even purposeful acts. Nor does it involve the vicarious attribution to a supervisor of the acts or delinquencies of his subordinates under any version of respondeat superior. Most important, this case does not require a final determination based upon a completed factual record of whether a supervisor can be held liable in a §1983 case, and does not involve the applicability or scope of any defenses a supervisory official may raise. The question before the Court is what a plaintiff must allege and prove in order to make out a prima facie case under §1983 against a supervisory official which, if not rebutted, is sufficient to go to a jury.

Furthermore, the broad question of what liability standard should be applied

in a §1983 action is not raised by this case. Whether "simple negligence," "gross negligence," or "deliberate indifference," must be proven to impose liability under §1983 is a specific, not a general, question. The answer to that question will necessarily vary with the nature of the right infringed and the circumstances surrounding the infringement. Defining the scope of the offended right and the nature of the supervisor's duty will in each instance effectively define any mental requirement §1983 may require.

The essence of the charge against Sheriff Baker is that his failure to supervise his office deprived the plaintiff of personal liberty.[1/] Donaldson v. O'Connor, 422 U.S. 563 (1975). A deprivation of liberty is precisely the kind of deprivation §1983 was designed to redress. Establishing that the supervisor's breach of his duty caused the plaintiff's harm would, in the absence of a legal defense, result in a finding of liability. Thus, the question presented here is not whether "mere negli-

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1/ Any sheriff should know that liberty is a constitutionally protected right. In addition, since Monroe v. Pape, 365 U.S. 167 (1961), it has been clear that an official need not have the specific intent to violate a constitutional right in order to be held liable under §1983.

gence" will support a cause of action under §1983 in some across-the-board sense. The questions raised here are whether Sheriff Baker owed a duty to prisoners to implement and enforce reasonable supervisory measures to ensure that their detention was constitutional; whether he breached that duty by failing to require his subordinates to check the identification of arrested persons against photographs and fingerprints of the person to be arrested that were on file and readily available in the sheriff's office; and whether it was foreseeable that that failure could result in an incorrect identification and an unconstitutional deprivation of liberty, such as actually occurred in respondent's case. If the answers to those questions are yes, then respondent alleged and proved a cause of action under §1983 sufficient, if believed, and if not rebutted by any affirmative defense the sheriff might have, to warrant liability under §1983.

A R G U M E N T

I. THE PETITION FOR CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

Certiorari was granted on the assumption that this case raised the question whether "simple negligence" states a claim under 42 U.S.C. §1983. See questions presented, Baker v. McCollan, No. 78-752, 47 U.S.L.W. 3430. That is an important question, but it is not raised by the allegations or facts in this case. It should not be decided on this record for three reasons.

First, the complaint alleges that petitioner acted "wilfully, knowingly and negligently" (paragraph 4, emphasis supplied, Appendix at p. 8). The use of the conjunctive indicates that respondent intended to prove more than just negligence. Indeed, the complaint explicitly seeks exemplary damages based on "gross negligence and reckless disregard" (paragraph 7 of the Complaint, Appendix, p. 9).

Furthermore, if the jury were to find "gross negligence" or "reckless disregard," as it might on this record, it would not be

necessary or appropriate for this Court to decide in this case whether liability based on a lesser finding of "mere negligence" would suffice. Thus, in our view, consideration by the Court of the "simple negligence" issue is premature. Cf. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); Rescue Army v. Municipal Court, 331 U.S. 549, 568-69 (1947).

Second, the district judge directed judgment for petitioner "after the close of evidence by both parties" (Appendix, p. 16, emphasis added). Although the circuit court assumed that the district judge directed verdict for petitioner because he believed respondent failed to make out a prima facie case (see Appendix at p. 20-21), it is equally possible that the district judge believed respondent had made out a prima facie case, but believed that petitioner had established a good faith defense as a matter of law. If so, the question of the proof required to make out a prima facie case under §1983 would not be raised by this case.[2/]

2/ Accordingly, in the alternative, if certiorari is not dismissed as improvidently granted, the Court should summarily vacate the decision below and remand for clarification of this point.

Third, as shown infra in Point II.B.1, Texas law imposes strict liability on sheriffs for the acts of their deputies, even if the sheriff has not been negligent in any way. Thus, at least in Texas, it would not be unfair to subject sheriffs to liability even for "simple negligence,"[3/] and it is not necessary or appropriate to decide, in this case, whether simple negligence would be sufficient to state a cause of action under §1983 in a state that does not subject sheriffs to strict liability.

3/ Even a "simple negligence" standard would not require Texas sheriffs to do anything they are not already required to do by Texas law, and would not in any way limit their existing discretion.

II. THE FAILURE OF A SUPERVISORY OFFICIAL TO SUPERVISE HIS SUBORDINATES WHEN HE HAS A DUTY TO DO SO CAN SUPPORT LIABILITY UNDER 42 U.S.C. §1983.

The lower federal courts are in disagreement whether the "simple negligence" of a line officer who inadvertently inflicts an injury upon a citizen can support liability under §1983.[4/] Compare Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976)(en banc) with Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969) and Norton v. McKeon, 444 F. Supp. 384 (E.D.Pa. 1977). But, as shown below, the courts agree unanimously that the failure of a superior to supervise his subordinates is actionable under §1983 where breach of a duty

4/ Calling any of the acts in this case "simple negligence" is misleading. None of the acts committed here was "accidental." The deputies plainly intended to keep respondent locked in a cell throughout the period at issue. The question here is a legal question, not a psychological one, namely the proper standard of care to require of jailers and police officers.

to supervise deprives a citizen of a federally protected right under circumstances making it reasonably foreseeable that the failure to supervise would cause the deprivation.

The proper approach in determining whether supervisory personnel can be held liable under §1983 for failure to supervise their subordinates was outlined in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). The major holding in that case was that a municipality can be sued under §1983 if "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers." Ibid. at 690. But Monell also indicated the legal rules to be applied when an individual supervisor (as opposed to a governing body) is sued.[5/] In footnote 58 of the Monell

5/ Although petitioner attempts to cloud the issue by arguing that the subordinates, and not Sheriff Baker, "were the causes, in fact, of the deprivation" (Pet.Br. at 3), the inquiry in §1983 cases is concerned with proximate cause as defined in tort law, not the layman's concept of "cause in fact." See Monroe v. Pape, 365 U.S. 167, 182 (1961).

opinion, the Court said:

> By our decision in Rizzo v. Goode, 423 U.S. 362 (1976), we would appear to have decided that the mere right to control without any control or direction being exercized and without any failure to supervise is not enough to support §1983 liability. (emphasis added).

This test thus defines the "affirmative link" between the actions of subordinates and their supervisors required by Rizzo v. Goode to establish "causation" for purposes of §1983.6/ The Monell test

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6/ In Rizzo, the Mayor, the City Managing Director, and the Police Commissioner, were sued because of the actions of individual police officers not parties to the action. The lower court found that the only "affirmative link" between the higher officials and the civil rights violations was the failure to change police disciplinary proceedings in response to ad hoc incidents and complaints. Rizzo left open the issue raised by this case - whether failure to supervise where control is ordinarily exercised - can lead to §1983 liability. The principal defendants in Rizzo were not charged with a failure to supervise. Unlike the Sheriff here, there was no proof that they had failed to enforce their own rules, guidelines, or standard practices, or the practices that any reasonable individual would undertake in similar situations. Although "the behavior of the Philadelphia police was [not] different in kind or degree from that (FN continued on next page)

is satisfied if (1) control or direction is exercised by a supervising officer and (2) there is a failure to supervise proximately causing forseeable harm to a federally protected right. If these elements are proven, then failure to supervise can constitute a prima facie case for liability under §1983.

A. Actual Control And Direction

The Monell test requires, first, that the defendant have exercised actual control and direction. This requires something more than the merely theoretical right to control. Obviously, in a large police department like Philadelphia's, the mayor, city manager or even the police commissioner does not direct the line officers in their day-to-day activities. The unknown actions of policemen on the beat whose

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which exists elsewhere," 423 U.S. at 375, the sheriff here is charged with conduct that differs unreasonably from the conduct that ordinarily prevailed in his department, or that prevails in other sheriff's departments of similar size and locality. Whether this is true is a question of fact for a jury, not a question of law for a court.

identities the higher officials never knew (or even should have known) perhaps ought not be laid on the doorstep of the highest city officials. By contrast, the defendant in this action, Sheriff Baker, had direct, physical day-to-day control over the deputy who actually inflicted the injury. And as alleged in the complaint, under Texas law, the Sheriff had a non-delegable duty to supervise his deputies, and was personally responsible for their official acts. V.A.T.S. Art 6869, Art. 6870 and Art. 5116.

B. Failure To Supervise

As the Monell test makes clear, even if the evidence permits a finding of actual control and direction, there can be no §1983 supervisory liability without proof of breach of a duty to supervise. But liability attends breach of that duty regardless of whether the breach involved "doing something" or "doing nothing." Federal courts applying the test have found supervisors liable, for example, when a supervisor, present at the beating of a prisoner, "does nothing" to prevent it. Harris v. Chancelor, 537 F.2d 203 (5th Cir. 1976); Byrd v. Brisbke, 466 F.2d 6

(7th Cir. 1972) As the Ninth Circuit said recently in Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978):

> A person "subjects" another to the deprivation of a constitutional right, within the meaning of Section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made. (emphasis added).

Lower federal courts have consistently held that supervisors can be held liable if they "personally participate" in the act that gave rise to the plaintiff's injury. But such personal participation or involvement does not mean that the supervisor must actually have directed the conduct. It is enough that he failed to intervene to stop or prevent a violation when he had a duty to do so. This duty to act can arise in at least three different ways, described below, and two of them are clearly available to the respondent here as bases for establishing a prima facie case against the petitioner.

1. Failure to perform a statutory duty

If a supervisor is required by law to oversee his subordinates and ensure that they properly obey applicable rules designed to safeguard the federally protected rights of those under their charge, but the supervisor fails to exercise that control, he will be and ought to be held liable under §1983. For example, in Johnson v. Duffy, 588 F. 2d 740 (9th Cir. 1978), the sheriff was required by California law to set up a classification committee to run prison honor camps where an inmate might earn money while serving his time. The classification committee alone had the power to order forfeiture of the inmate's earnings or his transfer to another regular prison if he violated rules. An inmate was accused of violating prison rules by being late to lunch. He was ordered transferred by another official and his earnings were forfeited. However, the order was not made by the classification committee pursuant to the California statutory requirement. The court held that the sheriff who was required to set up the

classification committee and act as its chairman could be held answerable under §1983 for his "omission to act in violation of the duties imposed upon him by statute":

> ...The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury. 588 F.2d at 743-44 (emphasis added).

The Court continued:

> Under the California statutes, together with the regulations promulgated pursuant thereto, Duffy was not only required to appoint the Classification Committee, he was also Chairman of the Committee charged with the responsibility of ordering Johnson's transfer from honor camp to the county jail. Duffy himself did not sign a transfer order on behalf of the Committee, and it is agreed that the Committee never met. Nothing in the record even suggests that Duffy could or did lawfully delegate his duty or the duty of the Classification Committee as a whole to act upon Johnson's transfer. Duffy's omission to act, in violation of the duties imposed upon him by statute and by regulations, thus may subject him to liability under section 1983. (emphasis added)

See also United States ex rel Larkins v. Oswald, 510 F2d 583 (2d Cir. 1975) (prima facie case of unlawful confinement in violation of §1983 made out by proof of breach of statutorily imposed duty of prison superintendent to take reasonable measures to avert unlawful segregative confinement).

Precisely such a statutory duty is involved in this case. Texas law specifically requires that "in all cases the sheriff shall exercise supervision and control over the jail," thus clearly establishing Sheriff Baker's statutory responsibility for the circumstances of respondent's incarceration. V.A.T.S. Art. 5116 (b) (emphasis added). In addition, by establishing a standard of strict liability for Sheriffs for the official acts of their deputies, V.A.T.S. Art. 6870,[7] and by specifying that deputies are, by law, agents of the sheriff rather than merely "employees", V.A.T.S. Art. 6869,[8] Texas

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7/ V.A.T.S. Art. 6870 provides in relevant part, "Sheriffs shall be responsible for the official acts of their deputies..."

8/ V.A.T.S. Art. 6869 provides in relevant part that deputies "shall have power and authority to perform all the acts and duties of their principals."

already subjects its sheriffs to liability on the basis of their supervisory action or inaction in circumstances even less direct and personal than required by Monell.[9] In short, Texas law provides for a cause of action in tort based on a breach of a duty to supervise. Indeed, it goes even further -- by authorizing a direct action against the sheriff for the official acts of his deputies. This establishes a statutory "duty to supervise" of the highest possible order.

9/ The Court has indicated that, where state laws better serve the policies of protecting civil rights, they may be relied on by federal courts in civil rights actions. See Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1968) and 42 U.S.C. § 1988. Thus, the Texas statutes, if applied by the courts below, could end this Court's present inquiry. The Fifth Circuit has adopted the rule that "the question of a sheriff's vicarious liability under Section 1983 for acts of his deputy is controlled by state law," Tuley v. Heyd, 482 F.2d 590, 594 (5th Circ. 1973); Baskin v. Parker, 588 F.2d 965, 968 (5th Cir. 1979).

2. Failure to perform a duty arising from actual knowledge

A second group of cases concerning the duty to supervise is relevant to understanding the nature of a §1983 cause of action for breach of that duty even though the same factual basis is admittedly not presented here. In these cases, the supervisor may have become aware that the actions of his subordinates, over whom he exercises direction and control, have caused or are likely to cause constitutional injuries. If the evidence demonstrates that the supervisor was or should have been alerted to the danger, but nevertheless did nothing to avert it, then he should be held liable under §1983 if the foreseeable injury does in fact take place.

A typical case of this genre is Roberts v. Williams , 456 F.2d 819 (5th Cir. 1972) cert. denied, 404 U.S. 866 (1971). There it was held that a supervisor could be held liable under §1983 for his failure to train and supervise a prison trusty who shot a prisoner. The prison trusty's negligence in the use of a shotgun was the immediate cause of the plaintiff prisoner's injury. However,

the court held that the superintendent of the County Farm, who was responsible for supervising the trusty system, was also properly subject to liability under §1983. The superintendent knew that the trusty he selected had previously been convicted of assault with intent to kill. Based on those facts, the court held that a jury could quite properly find both direction and control and breach of a duty to supervise which foreseeably and proximately caused the prisoner's injury. Similarly, Byrd v. Brishke, supra, involved a civil rights action filed against several Chicago policemen for the beating of the plaintiff, Thomas Byrd, in the backroom of a local tavern. A verdict for the defendants was reversed by the Seventh Circuit. In an opinion by Chief Judge Swygert, the court held that a §1983 suit could be maintained against supervisory officers who, though present, failed to protect the plaintiff. Under these circumstances, the jury could have found a breach of a duty to enforce the laws, preserve the peace, and avert summary punishment.[10]

10/ "We believe it is clear that one who is given the badge of authority of a police officer

(FN continued on next page)

In Sims v. Adams, 537 F.2d 829 (5th Cir. 1976), plaintiff sought damages for injuries caused by a police officer. Liability was predicated on the failure of supervisory defendants, including the Mayor and Chief of Police of Atlanta, to discipline a police officer whom they knew to be prone to violent acts. Citing other cases, such as Roberts v. Williams, supra, and Beverly v. Morris, supra, Judge Gee reversed the lower court's dismissal as to the liability of those supervisory defendants under §1983.

3. Failure to establish reasonably adequate protective procedures.

Finally, a supervisor may also be held liable when he fails to take precautions which he reasonably should have known were required to protect a citizen's rights. There may be no specific statutory

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may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge. That responsibility obviously obtains when the nonfeasor is a supervisory officer to whose direction misfeasor officers are committed." Byrd v. Bushke, supra, 466 F.2d at 11.

duty imposed upon him, and he may not have specific facts before him to alert him to the potential for danger to the citizen. But his failure to take elementary precautions that others in the same situation would take could lead to liability where his own failure proximately causes a foreseeable deprivation of a federally protected right.

In Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974), for example, a case whose facts approximate those here, the plaintiff was a diabetic and disappeared from his home one night. His wife alerted the Oklahoma City Police Department, which issued an all-points bulletin for the plaintiff. In the meantime, he was arrested on a charge of public drunkenness by a police officer who mistook the symptoms of diabetic reaction for drunkenness. He remained in jail for four days in a diabetic coma without medical attention. Because of his lack of insulin, he suffered a stroke and brain damage. The police chief was unaware of the particular problem. He did not order the arrest, nor did he know of the search for the missing man. Nevertheless, the Court of Appeals held he

could be held liable in a §1983 suit for his failure to supervise and establish proper procedures:

> We hold that the Court erred in granting Police Chief Lawson's Motion to Dismiss. On the face of the Amended Complaint, Dewell has alleged that Lawson, as Chief of Police, failed to perform a duty imposed upon him which resulted in the deprivation of Dewell's civil rights, i.e., lack of proper identification and medical care constituting cruel and unusual punishment in light of Dewell's diabetic condition and subsequent brain damage and physical impairment by reason of non-treatment or care during his confinement. On the record before us we cannot hold, as a matter of law, that the Amended Complaint does not state a cause of action under 42 U.S.C.A. §1983. 489 F.2d at 881. (emphasis added).

There, as here, the "lack of proper identification" procedures by the person in charge of the jail led to the violation of federally protected rights. See also Parker v. McKeithen, 488 F.2d 553 (5th Cir. 1974), cert. denied, 419 U.S. 838 (1974). Here, as in Dewell, a jury could find that the supervisory official had a duty to enforce identification procedures which a "reasonable man" in that

role would have undertaken, and that that breach proximately caused an unconstitutional deprivation of liberty.

In yet another case, the police chief of Atlanta was held liable under §1983 for failure to supervise his subordinates. Beverly v. Morris, 470 F.2d 1356 (5th Cir. 1972). The defendant was sued "on the theory that Williams was negligent in failing to train properly the auxiliary officer, [and] to supervise his patrol duties...." The court, in a per curiam opinion, upheld judgment for the plaintiff. The judges emphasized that the case was "not one of vicarious liability founded on the theory of respondeat superior, but is instead a claim founded upon the defendant's own negligence." Beverly v. Morris, supra at 1357.

The District of Columbia circuit took a similar approach in Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971); rev'd on other grounds sub. nom., District of Columbia v. Carter, 409 U.S. 418 (1973). Although this Court chose not to address the issue of liability for failure to supervise subordinates on certiorari, see 409 U.S. at 420 n. 3,

the circuit court had addressed the matter specifically on appeal:

> Even if Captain Prete or Chief Layton is protected by official immunity from suit at common law, they are both subject to suit under §1983 for any negligent breach of duty that may have caused appellant to be subjected to a deprivation of constitutional rights. Indeed, Mr. Justice Frankfurter maintained that §1983 was designed for precisely such a case, i.e., the case in which the State shields a police officer from liability for conduct which would subject a private citizen to liability.... In particular, various supervisory officers have been held subject to suit under §1983 for negligence in supervising their subordinates. 447 F.2d at 365. (emphasis added).

In each of the above cases, the supervisor could be held liable under §1983 because all the elements of that cause of action were properly alleged or moved: the official acted under color of state law, a constitutional or other federal right was violated, and the supervisor proximately caused the violation by his failure to supervise when he had a duty to do so. The "negligence" of the supervisors in those cases is far different from the negligence of line officers, for several reasons.

First, supervisors have much broader responsibility, and their acts or omissions can cause correspondingly broader constitutional injuries. Failure to supervise subordinates properly may inflict damage far more widespread than a single officer could inflict. The failure of a supervisor to act can geometrically increase the rate of occurrence of constitutional injuries.[11/]

Second, it is the responsibility of a supervising official to establish and enforce general rules and regulations for those under his command. It is his job to foresee the implications of those rules for the citizens whom they affect. Since he is required to think and act in these broader terms, he should rightly be held liable if he fails in that responsibility.

Naturally, on the facts of this case, this "reasonable person under the circumstances" test does not merely mean the reasonable-man-on-the-street. The standard

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11/ See L. Friedman, "The Good Faith Defense in Constitutional Litigation," 5 Hofstra L. Rev. 501, 521 (1977).

is more appropriately framed in terms of the reasonable Texas sheriff. And by this standard petitioner Baker's conduct is seriously failing. Not only, as he conceded at trial, did Baker fail to see to it that his deputies followed the "ordinary" procedures for sheriff's offices the size of his; by failing to ensure that his duputies would follow governing local standards regarding the identification of arrested suspects, he also failed to organize his department to minimize the tort liability his deputies' actions would automatically impose upon him under Texas law. See discussion, supra. Texas law thus affects this case in two ways, both of which support the conclusion that Sheriff Baker could be held liable under §1983. First, as mentioned supra, Texas imposes a duty to supervise as a matter of law. In addition, Texas law also serves as evidence of what a reasonable Texas sheriff would do. It is plainly unreasonable for a sheriff to fail to establish reliable identification procedures in a state where, since 1846, sheriffs have been strictly liable for their deputies' acts. Mistaken identity is a common law enforce-

ment problem, and a Texas sheriff should be expected to take reasonable steps to avert it - and to do so before, not after, an innocent citizen has been deprived of his liberty for four days.

III. ALTHOUGH IT IS NOT NECESSARY FOR THE COURT TO REACH THIS POINT IN THE PARTICULAR CIRCUMSTANCES OF THIS CASE, SUBJECTING PETITIONER TO PRIMA FACIE LIABILITY UNDER §1983 BASED ON PROOF OF NEGLIGENCE WOULD BE CONSISTENT WITH THE TEXT AND LEGISLATIVE HISTORY OF §1983 AND WITH THE PRIOR DECISIONS OF THIS COURT.

A. Congress Did Not Intend to Incorporate Into §1983 Any Mens Rea Standard Higher Than Ordinary Negligence.

The language of 42 U.S.C. §1983 contains no explicit culpability standard, and does not expressly require proof of more than negligence. The legislative history of §1983 demonstrates that Congress intended to hold officials liable for negligent conduct as well as for reckless and intentional actions.

In its analysis of the legislative history of §1983 in Monroe v. Pape, supra, this Court found no intention by the enacting Congress to limit the reach of the civil remedies created by §1983 to intentional conduct. In reviewing the Congressional debates preceding passage of §1 of the Klu Klux Klan Act, the direct ancestor of §1983, this Court found the sense of Congress illustrated by Mr. Lowe of Kansas

who said "[w]hile murder is stalking abroad in disguise...the local administrations have been found inadequate or unwilling to apply the proper corrective," (emphasis added), Monroe, 365 U.S. at 175-76. To a similar effect is the comment in Monroe, 365 U.S. at 174, n. 10, that:

> The speaker, Mr. Arthur of Kentucky, had no doubts as to the scope of §1; "[I]f the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error in judgment [he is liable]..." (emphasis in original).

This Court also recited a statement during the debates by Mr. Borchard of Illinois as likewise recognizing the broad reach of the Act to situations in which "secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without proper effort to discover, detect, and punish the violations of law and order." Id. at 177 (emphasis added).

This congressional mood in enacting Act is summarized in Monroe:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in

> federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. (emphasis added).

It is thus evident from the legislative history reviewed in Monroe that Congress intended to permit injunctive relief and liability in damages for negligent conduct as well as for reckless and intentional conduct.[12/]

12/ It is noteworthy that even the dissenting opinion by Justice Frankfurter in Monroe, 365 U.S. at 202-259, agreed that conduct actionable under §1983 should not be limited to actions infused by more culpable mental states. Observing that the specific intent requirement established in Screws v. United States, 325 U.S. 91 (1944), was largely a fiction diluted "in practice to mean no more than intent without justification to bring about the circumstances which infringe. . . rights," Justice Frankfurther concluded:

> If the courts are to enforce [§1983], it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation... Petitioner's allegations that respondents in fact did the acts which constituted violations

(footnote continued on next page)

B. The Appropriate Standard of Care Under §1983 Should be Determined in Each Case by the Nature of the Right Infringed and the Circumstances Surrounding Its Infringement.

Although it is clear that §1983 was not enacted to create a general federal tort law, Paul v. Davis, 424 U.S. 693 (1976), this Court has nonetheless repeatedly held that §1983 "should be read against the background of tort liability that makes a man responsible for... his actions." Monroe v. Pape, 365 U.S. at 182. See also Pierson v. Ray, 386 U.S. 547, 556-7 (1967). Under

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> of constitutional rights are sufficient." Monroe, 365 U.S. at 207-208.

Incorporation of any general standard higher than ordinary negligence which would prevent courts from ordering injunctive or declaratory relief in §1983 cases would clearly violate congressional intent. Perhaps, for this reason, the court has created defenses to damage actions based on innocent mental states, without making such mental states relevant to the granting of injunctive relief. Accordingly, even if the Court were to rule that negligence would not state a cause of action for damages in §1983, it should not rule that negligence will not state a cause of action in cases seeking declaratory and injunctive relief.

ordinary tort law, a plaintiff cannot succeed unless there is a foreseeable risk of injury to him as a result of defendant's breach of a duty he owes the plaintiff.[13/] To support a course of action under §1983, that risk must be to a constitutional right foreseeably affected by the defendant's action or inaction, and the duty must stem from the defendant's status as an official acting under color of state law. A careful reading of §1983 "against the background of tort liability" leads to two conclusions: (1) no across-the-board standard of care requirement can sensibly be imposed upon the numerous civil rights §1983 is designed to protect, and (2) there is no danger that holding negligence to be a sufficient standard in this case will flood the federal courts with nonessential litigation.

13/ Prosser has written: "In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences, sufficiently great to lead a reasonable man in his position to anticipate them, and to guard against them." Prosser, Hornbook on Torts, (4th ed. 1971) (hereafter "Prosser on Torts"), at 145.

1. No across-the-board standard can sensibly be imposed on all actions brought under §1983.

In developing the doctrine of qualified immunity and the good faith defense, this Court has consistently measured a defendant's actions against the standard of reasonableness. See Wood v. Strickland, 420 U.S. 308 (1975); Procunier v. Navarette, 434 U.S. 555 (1978); Pierson v. Ray, supra. But those doctrines make no sense unless negligence is indeed a standard for liability, at least so far as certain constitutional torts cognizable under §1983 are concerned. For those defendants as to whom plaintiffs make out a case of malicious violation, or reckless disregard, or gross neglect of constitutional rights, the good faith defense will by definition be unavailing because those defendants will be unable to satisfy either the subjective or the objective element of the good faith defense.[14/]

14/ In the leading exposition of the good faith defense, this Court held that a school board member "is immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious inten-

(footnote continued on next page)

The only officials who could be absolved from liability by the good faith defense are those against whom plaintiffs have made out no more than a case of negligence. If plaintiff has proven malice, he has disproven subjective good faith; if he has proven gross or reckless disregard, he has disproven objective reasonableness. But if only negligence has been proven against an official, a good faith defense may relieve him from liability.

This is not to say that negligence would be a proper standard for liability for deprivation of all constitutional rights. Some constitutional rights are defined in terms of a particular mental component. For example, the Eighth Amendment's protection against "cruel and unusual" punishment implies by its terms that a certain mental state is a prerequisite to its violation. Consequently, in Estelle v. Gamble, 429 U.S. 97 (1976), the "infliction of unnecessary suffering" upon prisoners by

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tion to cause a deprivation of constitutional rights or other injury to the student." Wood v. Strickland, 420 U.S. at 322. Only if the official had a subjective good faith belief in the reasonableness of his actions, and if that belief was reasonable, will the defense prevail.

denial of medical care was held to amount to a violation of the Eighth Amendment, cognizable under §1983, only where such pain was inflicted through "deliberate indifference" to serious medical needs of prisoners. 429 U.S. at 104. But the text of the Fourth Amendment establishes a right to be free from unreasonable searches and seizures, not just from malicious or reckless ones. Consequently, this Court has held that in a §1983 action alleging illegal arrest, a plaintiff can get his case to a jury by simply showing that the official's conduct was objectively unreasonable, and not legally excused. See Monroe v. Pape, supra, and Pierson v. Ray, supra. Respondent's injury here clearly involves the values of personal autonomy

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15/ This court noted:

> ...a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a claim under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. 429 U.S. at 106.

and freedom from government intrusion protected by the Fourth Amendment.16/ If there is any conclusion to be drawn from the text of the Constitution regarding the standard of care implicit in §1983 actions, it is that the Eighth Amendment is peculiar and unique. Just as the text and legislative history of §1983 fail to support the conclusion that "negligence" should be categorically rejected as an appropriate standard of care to be imposed on state officers under §1983, so does the text of the Constitution discredit the notion that any one standard of care will suffice.

Since this Court held in Monroe v. Pape that an official need not have a specific intent to violate a citizen's constitutional rights in order to be held liable under §1983, the state and lower federal courts have had to scrutinize each fact situation presented to them to see whether, on the whole, the official had met the duty of care imposed by the Constitution on public officials. These courts have followed the common law in gradually evolving standards of care for the protection of constitutional rights on which both the citizen and the official may rely. In every case, the courts must ask (1) whether an injury was foreseeable to the plaintiff or people in the same class or situation as the plaintiff; (2) whether the possible injury to the plaintiff was one that foreseeably affected his constitutional rights, as opposed to some other personal interest; and (3) whether the constitutional violation at issue required a particular mental component on the part of the state officials involved.

16/ Indeed, this deprivation of liberty was total, and therefore invokes all the rights incorporated into the Fourteenth Amendment, many of which have no mens rea component. See generally Kirkpatrick, "Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement," 46 U. Cinn. L. Rev. 45 (1977).

2. Applying a negligence standard in the circumstances of this case would not flood the courts with nonessential litigation.

In Paul v. Davis, 424 U.S. 693 (1976), this Court expressed its concern that if all injuries inflicted by a state official were deemed constitutional violations, the federal courts would be overwhelmed with cases that ought to be tried as state law torts. However, the Court did not then and should not now react to that concern by holding that negligent violations of civil

rights by state officials can never suffice to state a cause of action under 42 U.S.C. §1983. As illustrated above, there is no support in the text or legislative history of §1983, the Constitution, the prior holdings of this Court, or sound policy for such a holding. Moreover, although a per se rule against "negligence" actions brought under §1983 might seem a convenient means of keeping state court tort actions out of federal courts, the proper application of existing principles of §1983 jurisprudence will necessarily have the same effect.

First, Paul v. Davis itself illustrates how the requirement that the plaintiff be deprived of a federally protected right avoids a wholesale conversion of tort actions into §1983 claims. In Paul, the court inquired whether plaintiff had been deprived of a federally protected right, as §1983 expressly requires, and found that he had not.

Second, as illustrated supra, focussing properly on §1983's requirement that the deprivation take place "under color of state law" will also limit §1983 to its intended purpose, and will exclude from federal jurisdiction those tort cases

that should properly be litigated only in state courts. The fact that the offender is a state official does not automatically establish that his acts are necessarily committed "under color of state law." As the court said in Monroe v. Pape:

> The essential element of this type of §1983 action is abuse of his official position.
> 365 U.S. at 172 (emphasis added).

Finally, careful attention to, and development of, the existing requirement that the risk of injury to a federally protected right be reasonably foreseeable will preclude litigation under §1983 of general state tort law claims, without the necessity of developing a new standard of prima facie liability which would require assessment of a public official's subjective mental state.

C. Rejection of Negligence as a Basis for §1983 Liability in This Case Would be Inconsistent With the Prior Holdings of This Court.

In Pierson v. Ray, 386 U.S. at 556-7, this Court reiterated the principle, first articulated in Monroe v. Pape, supra, that §1983 should be read against the background

of tort liability, and held that part of that background in the case of police officers making an arrest is the defense of good faith and probable cause. Because the defense of good faith and probable cause was available to police officers in common law actions for false arrest, the same defense was held to be available to them in §1983 actions based on false arrest. Just as the court in Pierson looked to common law tort doctrine to determine what defenses should properly be available to police officers in §1983 actions, so it ought now to look to the common law to determine what degree of culpability, if any, is necessary to make out a prima facie case under §1983 based on false imprisonment.

At common law, a plaintiff is not required to prove any degree of unreasonableness concerning the defendant's conduct in order to establish a prima facie case for the common law tort of false imprisonment. Questions concerning the defendant's mental state are left for the defendant to prove. The only elements necessary to state a prima facie case of false inprisonment at common law are: (1) intent to confine, (2) acts resulting in confinement, and (3) consciousness of the victim of con-

finement or resulting harm. Restatement, Second, Torts §35 (1965); Bryan v. Jones, 530 F.2d 1210 (5th Cir.) (en banc), cert. denied 429 U.S. 865 (1975). Thus, at common law, not only was negligence actionable; a prima facie case against a state official could be made out for even non-negligent false imprisonment. To require a plaintiff in a §1983 action arising out of false imprisonment to prove that a defendant acted with a greater degree of culpability than negligence would be an unwarranted deviation from the common law. Worse, it would create the anomalous result that constitutional and other federally protected civil rights receive less legal protection than non-constitutional personal and property interests which are protected by state tort law. Consequently, a proper comparison of this action to the "background of tort liability," as required by this Court, confirms that this respondent needed to establish no more than negligence to make out his prima facie case.

C O N C L U S I O N

For the reasons set forth in Point I, the writ of certiorari should be dismissed as improvidently granted. In the alternative, for the reasons set forth in Points II and III, the judgment below should be affirmed, and the case remanded for a new trial.

Respectfully submitted,

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